

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-5115-99

JDPappas

date:

to: Chief, Examination Division, Manhattan
Attn. Robert Hatler, Manager
Group 1669

from: District Counsel, New York CC:NER:MAN

subject:

I.R.C. §6501(c)(4)

Statute of Limitations Expires:

UIL Number: 6501.08-17

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You have asked us for advice concerning whether a Form 872 (Consent to Extend the Time to Assess Tax), signed by the taxpayer but unsigned by anyone authorized to do so on behalf of the Service, is effective. On September 17, 1999, we sent you a memorandum, informing you that there was legal authority to argue that the Form 872 was valid. We have been informed by the Office of Chief Counsel, however, that although there is some legal authority to support the validity of the Form 872, Service position is that we will concede the case when the Form 872 has not been signed on behalf of the Service. Accordingly, our previous advice is incorrect and we request that you destroy all copies of the memorandum. In addition, for the reasons discussed

below, we do not have a strong alternative legal basis to argue that the Form 872 is valid.

ISSUE:

Whether a Form 872 signed and dated by the taxpayer, stamped with the District Director's stamp but otherwise unsigned and undated by anyone authorized on behalf of the Service to sign is a valid consent to extend the statute of limitations.

FACTS:

[REDACTED]
(" [REDACTED] ") is a large corporate taxpayer, incorporated in Delaware, which files its tax returns in New York. One of the years under audit and at issue herein is the fiscal year ending September 30, [REDACTED]. On [REDACTED], a corporate officer of [REDACTED] executed a Form 872, extending the time to assess tax for the fiscal year ending September 30, 1993. On [REDACTED], a duly authorized manager for the Service signed and dated the Form 872. This Form 872 extended the time to assess tax until [REDACTED]. There are no concerns about the validity of this Form 872.

On [REDACTED], the same corporate officer executed a subsequent Form 872, extending the time to assess tax until [REDACTED]. The Service date stamped it as received on [REDACTED]. A stamp bearing the name of the District Director was placed on the line providing for the Director's signature. No one on behalf of the Service signed or dated the Form 872. You have recently informed us that the taxpayer's copy also bears the identical stamp with no signature. It is the validity of this Form 872 with which you are concerned. The manager believes he is the one who placed the stamp on the Form 872 but could not say with absolute certainty that he did. The District Director stamp is kept in the manager's locked desk; the only one with access, other than the manager, is his secretary. The manager did not know whether his secretary was in on the day that he believes the stamp was placed and whether she might have placed the stamp on the Form 872. The manager believes that he probably was the one who stamped the Form 872 with the District Director's name. The manager's usual practice is to sign and date the Form 872; he never intended the District Director stamp to represent his signature.

On [REDACTED], the examining agent signed Form 5348 (Examination Update), which is a request to update the computer records to reflect the statute extension. The manager, who should have signed the Form 872 but failed to, also signed the Form 5348. Subsequently, the examining agent requested a printout to verify that the computer records were updated. This

printout is undated but shows the statute expiring on [REDACTED]. The examining agent states that he placed the taxpayer's copy of the Form 872 in an envelope and mailed it. He did not utilize Form Letter 929 as called for in IRM 4541.1(8).

On [REDACTED], the same corporate officer once again executed a Form 872, extending the time to assess tax until [REDACTED]. When preparing to sign this Form 872 on behalf of the Service, a new manager first reviewed the previous Forms 872 and discovered the unsigned one.

LEGAL ANALYSIS:

I.R.C. § 6501(c)(4) provides, "Where ... both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon." (Emphasis added). A statutory waiver of the statute of limitations is not a contract. Florsheim Bros. Drygoods Co. v. United States, 280 U.S. 453 (1930); Strange v. United States, 282 U.S. 270 (1931). It is "essentially a voluntary unilateral waiver of a defense by the taxpayer." Strange, 282 U.S. at 276.

Section 301.6501(c)-1(d) of the Procedural Regulations provides that the time for assessment may be extended for any period of time agreed upon in writing by the taxpayer and the district director or an assistant regional commissioner, and adds: "The extension shall become effective when the agreement has been executed by both parties."

The Supreme Court expressly left open the question of whether a waiver unsigned by anyone for the government, and signed only by the taxpayer, is effective. R.H. Stearns Co. v. United States, 291 U.S. 54 (1934). The Circuit Courts are divided on whether a waiver is effective when it is unsigned by anyone for the government and signed only by the taxpayer. The First and Third Circuits have determined such waivers to be ineffective. See United States v. Bertelsen and Petersen Engineering Co., 95 F.2d 867 (1st Cir. 1938), aff'd, 306 U.S. 276 (1939); S.S. Pierce Co. v. United States, 93 F.2d 599 (1st Cir. 1937) and Commissioner v. United States Refractories Corp., 64 F.2d 69 (3rd Cir. 1933), aff'd per curiam by an equally divided court, 90 U.S. 591, 54 S. Ct. 94 (1933). The Ninth and Fifth Circuits have determined such waivers to be effective. See Holbrook v. United States, 284 F.2d 747 (9th Cir. 1960); Commissioner v. Hind, 52 F.2d 1075 (9th Cir. 1931) and John M. Parker Co. v. Commissioner, 49 F.2d 254 (5th Cir. 1931). The Holbrook court held that the statutory requirement that the Commissioner provide written consent was administrative and not designed "to convert into a contract what is essentially a voluntary, unilateral waiver of a defense by the taxpayer." Holbrook at 749, citing Strange, 282 U.S. at 276. Holbrook distinguished a directory from a mandatory requirement and held

that the written agreement by the Commissioner was only directory. The Second Circuit, by way of dicta, appears to support the view that waivers unsigned by the Service are valid. Lesser v. United States, 368 F.2d 306 (2nd Cir. 1966).

In 1956, the Service changed the regulations to read that "[t]he extension shall become effective when the agreement has been executed by both parties." In 1969, in Rohde v. United States, 415 F.2d 695, the Ninth Circuit focused on this regulatory change in holding that a collection period waiver, (Form 656) submitted in conjunction with an offer in compromise, was ineffective because the waiver form, which contained a signature line for the District Director, was not signed. The court distinguished its prior decisions in Holbrook and Hind, and felt that the form required a countersignature. Rohde, 415 F.2d at 699. In 1974, an almost identical opinion was handed down by the Fifth Circuit in United States v. Cook, 494 F.2d 573.

Finally, in a series of Actions on Decision considering the Rohde case, the Office of Chief Counsel determined that Rohde should be followed, in assessment as well as collection cases, i.e. for both Forms 872 and 656. The final revision (CC-1973-442, November 9, 1973) stated:

It does not appear that the Court of Appeals for the Ninth Circuit can be said to have erroneously interpreted the applicable portion of Treas. Reg. sec. 301.6502(a)(2)(i) promulgated in 1956 or that its decision was manifestly otherwise incorrect. Accordingly, it is recognized that the appropriate Service delegate must actually sign the waiver form prior to the expiration of the period of limitations to be extended and the effective date of the waiver is deemed to be the date the form is received by the Service. Furthermore, the entire matter is one which falls within the control of the Service, i.e., since internal procedures already call for the placing of the signature of the District Director or his delegate on each waiver form, future lawsuits concerning this issue can be prevented by additional emphasis upon such procedures. Thus, in the event a particular waiver form is not signed by the District Director or his delegate, prior to the expiration of the period of limitations, the Service will concede the issue, whether a Form 656, Offer in Compromise, or a Form 872, Consent Fixing Period of Limitation Upon Assessment of Income Tax, is involved.

Thus, although there is no published acquiescence in Rohde or official statement on the issue, the Rohde AOD (available to the public as an unofficial document) represents the position of Chief Counsel, at least for standard assessment and collection period waivers, and subsequent cases have tended to focus on whether the signature requirement was met, not whether it was necessary. See, e.g., Bridges v. Commissioner, T.C. Memo.

1983-763.¹ Based on the foregoing, an unsigned Form 872 is not valid.

Section 6501 and its regulations do not provide any guidance on how a Form 872 must be signed. Additionally, the instructions printed on Form 872 do not provide any guidance on how the Commissioner's signature should appear. Section 6061 provides the general rule that any return, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall be signed in accordance with forms or regulations prescribed by the Secretary. Under § 6061 and the regulations, the purpose of the signature is to authenticate and verify the return or other document submitted. The signature authenticates the document by identifying the document as the signer's.

Our preliminary research indicates that neither the Code nor its legislative history defines the term "signature." The generally accepted legal definition of signature is very broad: "the act of putting one's name on the end of any instrument to attest its validity; the name thus written." See Black's Law Dictionary 1381 (6th ed. 1990). See also Webster's New International Dictionary (2d ed. 1934) (defining signature as "the name of any person, written with his own hand to signify that the writing which precedes accords with his wishes or intentions"). 1 U.S.C. § 1 provides that "in determining the meaning of any Act of Congress, unless the context indicates otherwise, signature includes a mark when the person making the same intended it as such." Form 872 is not a contract, but essentially a voluntary, unilateral waiver of a defense by the taxpayer. Strange v. Commissioner, 282 U.S. 270 (1931). Nonetheless, contract principles are often considered in the interpretation of the form. See, e.g., Constitution Publishing Co. v. Commissioner, 22 B.T.A. 426 (1931). Under general contract principles, "the signature to a memorandum may be any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer." Restatement (Second) of Contracts § 134 (1981). These authorities are clear that a person has discretion in how he or she provides his or her signature.

¹ The Government's litigation position on this point is not entirely clear, however. Despite the 1973 acquiescence in Rohde, the Government successfully argued in a 1992 case, Scott v. United States, 70 AFTR 2d 92-5038 (E.D. Cal.), that at least for purposes of awarding litigation costs, the requirement of the Commissioner's signature was an "unsettled question." And as late as 1994, in Howard v. United States, 868 F. Supp. 1197 (N.D. Cal.), the Government argued, unsuccessfully, that Rohde should be limited to its specific context, a waiver submitted with an offer of compromise, and that outside that context the Commissioner's signature was not required.

The validity of a signature is not dependent upon a particular form. Thus, the name stamp of the district director may qualify as a mark to indicate an authorized delegate's intent to authenticate or verify the Form 872, provided that the delegate intends the stamp to be his or her signature for these purposes.

Under the above reasoning, in order to hold the Form 872 valid, the manager must have intended the District Director stamp to constitute his signature. We have been told that such is not the case here. Therefore, the Form 872 would not be valid under this argument. In addition, the manager's secretary may have had access to the stamp, which would further weaken the argument. (Cf. Delegation Order No. 42). We also do not have any evidence showing on what date the name stamp was placed on the form. (Cf. Harber v. Commissioner, T.C. Memo. 1992-707).

We had previously informed you that there may be an estoppel argument, which would hold the waiver valid. See Stearns, 291 U.S. 54. Upon further investigation we have concluded that the estoppel argument cannot prevail because the Service failed to follow procedures set forth in the manual.

CONCLUSION:

Based on the foregoing, the unsigned Form 872 is invalid and the case is barred by statute of limitations. We recommend that in the future you take all steps to ensure that all waivers are signed by both the taxpayer and the person authorized to sign on behalf of the Service and that you properly follow Service procedures. In addition to the recommendations made above, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the Form 872, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable. We urge you to follow these procedures with respect to all Forms 872 to ensure that the

statute of limitations does not mistakenly lapse. We cannot emphasize enough the importance of following the procedures laid out in the manual. If you have any questions, please call Jeannette D. Pappas at (212) 264-1595, ext. 243.

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